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In The

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 108

JACKSON MORGAN, *Petitioner*

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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In The

Supreme Court of the United States

OCTOBER TERM, 1967

No._____

JACKSON MORGAN, *Petitioner*

vs.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Jackson Morgan, your petitoner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on March 13, 1968; a petition for rehearing was denied on April 17, 1968.

JUDGMENTS AND OPINIONS BELOW

The judgment of the District Court below (Appendix B) has not been officially reported.

The opinion of the Court of Appeals below (Appendix C) has not been officially reported as yet.

JURISDICTION

This is a criminal prosecution charging the petitioner, as defendant, with offenses under a six count indictment.

Two counts charged sale or concealment of narcotics under 21 U.S.C. §174; two counts charged sale of narcotics without federal tax stamps under 26 U.S.C. §4704(a); and two counts charged sale of narcotics without the required order forms under 26 U.S.C. §4705(a). Defendant was convicted on all six counts by jury verdict, and he was sentenced to ten years on each count to be served concurrently.

The jurisdiction of the District Court was invoked under Title 18 U.S.C. Section 3231. The United States Court of Appeals affirmed the judgment in an opinion rendered March 13, 1968, and a timely petition for rehearing was denied on April 17, 1968 (Appendix E). The jurisdiction of the Circuit Court was invoked under 28 U.S.C. §1291. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

QUESTIONS PRESENTED

1. Did Congress intend 21 U.S.C. §174 to be interpreted so as to raise such a broad presumption to aid the prosecution in its burden of proof as was done in this case?

2. Did Congress intend 26 U.S.C. §4704(a) to be interpreted so as to raise such a broad presumption to aid the prosecution in its burden of proof as was done in this case?

3. If it is apparent that Congress did so intend that the presumption created under 21 U.S.C. §174 was to be applied in the manner as was done in this case, is said presumption logical, reasonable, proper, or even constitutional?

4. If it is apparent that Congress did so intend that the presumption created under 26 U.S.C. §4704(a) was

to be applied in the manner as was done in this case, is this presumption proper or even constitutional?

5. Are the requirements of 26 U.S.C. §4705(a) and 26 U.S.C. §4704(a) proper or even constitutional?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment V, U.S. Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. Amendment IX, U.S. Constitution:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

3. 21 U.S.C. §174.

Penalty—Evidence:

"Whoever fraudently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, concontrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not

more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954 [26 §7237(c)]), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

4. 26 U.S.C. §4704(a).

Packages—General Requirement:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

5. 26 U.S.C. §4705(a).

Order Forms—General Requirement:

"It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate."

STATEMENT

There are set forth below only enough facts to place the foregoing questions in their proper setting.

Your petitioner was indicted under the above-entitled statutes on January 4, 1967. The full text of the indictment will be found in Appendix A for the Court's convenience.

Title 21 U.S.C. §174, which is the basis of Counts I and II of the indictment, raises a presumption that whenever narcotics are found in the possession of a defendant that the items were illegally imported into the United States and the defendant knew this. The Government called a chemist to testify. On cross-examination he stated that heroin hydrochloride is manufactured from morphine and that morphine is extracted from opium poppies (Tr. 117-118); he stated that the poppies grow in the United States and that it is a fairly simple operation to extract morphine and manufacture heroin from the poppies that grow in the United States. He stated that opium poppies grow in a temperate climate and that samples had been submitted to him from various parts of the United States such as Florida, Texas, California, and from parts of New Mexico and Arizona. He further stated that in examining the samples he could not determine if it was made in the United States or not (Tr. 119).

The Deputy United States Attorney in his closing argument (Tr. 141) conceded that the poppies could have been grown in the United States and that the heroin could have been manufactured here, but that the jury still had the duty to find the defendant guilty of knowing that they had been imported illegally because of presumption of law; this whether or not they had been imported legally or not (Tr. 141-142).

Title 26 U.S.C. §4704(a), which forms the genesis of Counts III and IV of the indictment, provides for the requirement of obtaining appropriate taxpaid stamps. This section provides in relevant part that the absence of appropriate taxpaid stamps from narcotic drugs shall be *prima facie evidence* of a violation of this

subsection by the person in whose possession the same may be found. During the course of the trial a Government's witness was allowed to testify over objection that Exhibit 2 (one of the containers in question) contained no revenue stamp (Tr. 65); the same witness was also allowed to state that Exhibit 1 (another container) had no revenue stamps, over objection, and that the Exhibits therefore spoke for themselves. This was the extent of the evidence pertaining to Counts III and IV.

Defendant made strenuous objection to the presumptions created by the statute (Tr. 122-124) and the trial court's instructions pertaining to them (Tr. 166-167, 169, 179-180). Yet the defendant was convicted under both.

Title 26 U.S.C. §4705(a), which is the foundation of Counts V and VI of the indictment, contains provisions requiring the defendant to register with the requisite authorities to obtain a written order from the latter before selling, bartering, exchanging or even giving away narcotics. The District Court convicted the defendant under this section. However, the proceedings were had prior to the landmark case *Haynes v. United States* (No. 236, January 29, 1968, D.J. No. 80-73-18) which dealt adversely with a statute which had similar provisions.

The Court of Appeals affirmed the conviction on all six counts. The Circuit Court upheld the statutory presumptions merely by citing a series of predominantly Ninth Circuit decisions. However, petitioner contends that these questions demand more than a cursory examination in view of the gravity of the issues involved. Indeed, petitioner contends it is quite difficult to syllogistically uphold either presumption. An objection to 26 U.S.C. §4705(a) was not submitted to the Circuit

Court since it was already called for argument prior to the Haynes decision. However, your petitioner respectfully submits that this section should be examined in light of the Haynes decision which casts the same doubt on the validity of the statute in view of the similarity between the two statutes.

REASONS FOR GRANTING THE WRIT

1. Congress' Intent as to 21 U.S.C. §174

It is respectfully submitted that the lower courts construed the presumption created by 21 U.S.C. §174 probably not in accord with Congress' intent. Congress is presumed to act constitutionally and concededly every effort should be made to uphold a statute. It has long been the rule that for a legislatively created presumption to be valid there must be a rational and logical connection between the facts presumed and the ultimate facts proved, *Yee Hem vs. United States*, 268 U.S. 178, 69 L.Ed. 904, *United States v. Gainey*, 380 U.S. 63, 13 L.Ed. 2d 658, 662.

The legislative presumption complained of here was originally authored in 1909, Cr. 100 §2, 35 State 614, and has been reenacted in every amendment ever since. In 1956, after extensive hearings on the Narcotic Drugs Import and Export Act, Congress reenacted an amended version that contained the same provision. The purpose of the act as stated in the Report of the Committee on Ways and Means on H. R. 11619 on Pg. 11 stated that the act was designed to control the *importation* of opium. The words importation and smuggling are used throughout the committee report. The Senate Judiciary Committee report, 84th Congress, 2nd Session, Calendar No. 2014, on Page 3, states that the provisions are based

on the assumption that the primary sources of opium come from abroad.

Clearly since the stated purpose of the act is to control narcotics in foreign commerce, it is apparent that Congress intended that the whole basis of federal jurisdiction under this statute is that the goods were obtained through foreign commerce. To rule otherwise would assume that Congress intended that a conviction can be obtained under this section even if the narcotics found in Defendant's possession were entirely grown and manufactured domestically. Such flies in the face of the stated purpose of the statute. It is further submitted that Congress did not intend to shift the entire burden to the defense; it is apparent that there must be some showing by the prosecution that the contraband complained of was obtained through foreign commerce.

2. Congressional Intent in Regard to 26 U.S.C. §4704(a)

It is further submitted that the lower courts construed the presumption too comprehensively to comply with Congress' intent. The presumption essentially provides that the mere absence of appropriate taxpaid stamps shall be *prima facie* evidence of illegality.

Certainly, Congress did not intend to shift the entire burden to the defense. This provision had its genesis in the Harison Anti-Narcotic Act originally passed in 1914. However, in passing said act Congress gave no indication that it intended to shift the burden away for the Government to at least show how the absence of said stamps indicated criminality; the Government should at least show why the absence of said stamps is illegal. For instance, several circuits have conflicted on the necessity of proving scienter. For instance, the Eighth Circuit in *Nigro v. U.S.*, 4 F.2d

781, said it was, yet *Bracco v. U. S.*, (C.C.A.G.), 117 F. 2d 858, said it was not. However, it does seem that in order for the section to be valid Congress did intend that some showing of criminal knowledge be required.

It is therefore respectfully submitted that Congress intended that in order to convict under 26 U.S.C. §4704(a) there must be some showing of criminality over and above mere possession.

3. Constitutionality of 21 U.S.C. §174

Petitioner respectfully submits that if it is impossible to construe the statutes complained of any other way, then they are invalid. In fact, petitioner submits that legislative presumptions in general that are designed to make it easier to obtain a conviction flies in the face of basic common law traditions.

This Court has repeatedly stated that for a presumption to be valid, there must be some rational connection between the fact presumed and the fact proved, *Yee Hem v. U. S., supra, United States v. Gainey, supra.* In *Yee Hem, supra,* the Court stated this very crucial requirement in upholding the Act. Reasonableness was the key in *Tot v. U. S.*, 319 U.S. 463, 87 L.Ed. 1519, and *Cases v. U. S.*, 131 F.2d 916, cert. denied 319 U.S. 770, 87 L.Ed. 1718.

It is respectfully submitted that it is not logical to presume from the mere possession of narcotics that the goods were illegally imported and the defendant knew this. The Government's own witness stated that narcotics can be grown and manufactured in the United States and that he himself could not tell whether they came from outside the country or not. How can the defendant be expected to know if the narcotics came from outside the country if the Government's own ex-

perts cannot tell? Actually, the way the presumption is worded, a defendant can be convicted whether or not the goods come from abroad. In fact, because of the presumption, if the Government just proves possession an accused can be convicted under this section if the defense offers no explanation. The jury would be compelled to conclude that the narcotics were illegally imported and the defendant knew this. Essentially, the jury's function is preempted by statute and to save time the trial court may as well direct a verdict of guilty since the jury must vote this way under the terms of the clause.

Even if the clause creates a mere inference which does not compel the jury to reach the desired conclusion, the clause is invalid. A defendant may be convicted under Section 174 even if the facts are absolutely contrary to the facts presumed. If the defendant does not offer any evidence, which is his right, he may be convicted of illegally importing narcotics when, in fact, said goods were entirely grown and manufactured in this country. It is respectfully submitted that it is beyond the power of Congress to make a dog a cat by legislative fiat.

It is also submitted that the statute placed a burden on the defendant to explain himself. He must either testify or offer some evidence to purge himself of the reaches of the statute. This, it is further submitted, flies in the face of the basic common law tradition that the entire burden is on the prosecution and the defendant need do nothing. This, it is suggested, violates the due process clause and self incrimination clauses of Amendment V of the Constitution. The presumption also infers criminal intent within its reaches which cannot be done, *Benton v. U.S.*, 98 App. D.C. 84.

It is respectfully submitted, therefore, that the presumption created under 21 U.S.C. §174 is illogical and too comprehensive to meet the exact standards of due process of law.

4. Constitutionality of 26 U.S.C. §4704(a)

It is further submitted that the presumption raised under 26 U.S.C. §4704(a) is too vague and comprehensive and, indeed, illogical to meet constitutional standards. Most of petitioner's objections to 21 U.S.C. §174 also pertain here.

However, to be more specific, petitioner contends that it is pretty difficult to presume illegality from the mere absence of the required stamps. There is utterly no requirement to prove some criminal knowledge of the illegality on the part of the defendant. Certainly, the concept of mens rea is included in the requirements of due process. Yet this presumption requires the defendant to explain that he did not have criminal intent rather than the reverse. The burden on the prosecution to at least prove some criminality on the part of the defendant has been an elementary precept of the common law, at least since the Restoration. Unless we adopt the Code system of jurisprudence the burden must remain with the prosecution to prove each and every element of its case.

Under the terms of the presumption all the Government has to do is to introduce into evidence the stampless items and a conviction is assured.

Petitioner respectfully submits that to infer criminal intent from the mere absence of the appropriate tax-paid stamps not only stretches syllogistic reasoning to its limits but places a heavy burden on the defense to extricate itself.

5. Constitutionality of 26 U.S.C. §4705(a) and §4704(a)

It is further submitted that in light of *Haynes v. United States* (No. 236, January 29, 1968, D.J. No. 80-73-18) this section is invalid as requiring the defendant to incriminate in violation of Amendment V of the United States Constitution. The section requires a person to obtain a written order on a form issued by the Secretary of the Treasury or his delegate before selling, exchanging, or even giving away narcotic drugs. To obtain a form a person must first register and pay a tax. Therefore, Sections 26 U.S.C. §4704(a) and §4705(a) should be read together for purposes of this objection.

To comply with the provisions of these sections one must essentially admit that he either has possession of narcotic drugs or expects to. Except for a very narrow class of people, admitting such subjects the prospective licensee to severe criminal liability. All the sections complained of in this petition, taken together with 21 U.S.C. §188(b), are designed to make the mere possession of narcotics illegal. The mere admitting of possession, as is required under 4704(a) and 4705(a) among other provisions of the statute such as 4721 and 4722, subjects a person to severe consequences.

In the recent Haynes decision this Court held that a proper claim of the constitutional privilege against self incrimination provides a complete defense to prosecutions for failure to register a firearm under 26 U.S.C. §5481 or for possession of an unregistered firearm under 26 U.S.C. §5851, thereby making such provision nugatory. The same type of provisions are involved in this case.

Petitioner further contends although that he did not claim the privilege originally that the Government

should concede that he would have done so had he known that he could have done so in light of the Haynes case; that he made no knowing waiver of his privileges. This is the position the Government has taken in the wake of the Haynes case in respect to firearms.

Petitioner submits that in order to uphold the narcotics statutes one must make a moral judgment that it is worse to possess narcotics rather than firearms. Such a subjective analysis, however, has no standing in constitutional law. What applies for one applies for the other. Petitioner respectfully submits that 26 U.S.C. §4705(a) and 26 U.S.C. §4704(a) are invalid for the reasons stated above.

CONCLUSION

The questions set forth above raise very fundamental questions that should be resolved by this Court. Although the determination of the case is important to the defendant, who will serve 10 years in prison, it is also important because they involve basic questions in the prosecution in an important area. Petitioner concedes that it is important to find a way to control drug abuse in this country. However, this should not be done at the expense of the Constitution which perhaps sets this country above all others on the face of the globe. Petitioner further concedes the emotional content involved in this most controversial area. However, to ignore the Constitution in regulating narcotics, especially in the area of legislative presumptions, sets a precedent that could lead to even more severe problems in the future.

For all these reasons, it is respectfully submitted that a petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Indictment Below of United States District Court Western District of Washingon, Northern Division

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JACKSON MORGAN,
Defendant.
No. 51157

The Grand Jury charges:

COUNT I

That on or about March 21, 1966, at Seattle, Washington, within the Northern Division of the Western District of Washington, JACKSON MORGAN did knowingly and unlawfully conceal and sell a quantity of narcotic drugs, to wit, approximately 66.921 grams of heroin hydrochloride, knowing the same to have been imported into the United States contrary to law.

All in violation of Title 21, U.S.C., Section 174.

COUNT II

That on or about April 11, 1966, at Seattle, Washington, within the Northern Division of the Western District of Washington, JACKSON MORGAN did knowingly and unlawfully conceal and sell a quantity of narcotic drugs, to wit, approximately 30.009 grams of heroin hydrochloride knowing the same to have been imported into the United States contrary to law.

All in violation of Title 21, U.S.C., Section 174.

COUNT III

That on or about March 21, 1966, at Seattle, Washington, within the Northern Division of the Western District of Washington, JACKSON MORGAN did

knowingly and unlawfully sell, dispense and distribute a quantity of narcotic drugs, to wit, approximately 66.921 grams of heroin hydrochloride, not in or from the original stamped package.

All in violation of Title 26 U.S.C., Section 4704(a).

COUNT IV

That on or about April 11, 1966, at Seattle, Washington, within the Northern Division of the Western District of Washington, JACKSON MORGAN did knowingly and unlawfully sell, dispense and distribute a quantity of narcotic drugs, to wit, approximately 30.009 grams of heroin hydrochloride, not in or from the original stamped package.

All in violation of Title 26 U.S.C., Section 4704(a).

COUNT V

That on or about March 21, 1966, at Seattle Washington, within the Northern Division of the Western District of Washington, JACKSON MORGAN did knowingly and unlawfully sell a quantity of narcotic drugs, to wit, approximately 66.921 grams of heroin hydrochloride, not in pursuance of a written order of the person to whom such heroin hydrochloride was sold on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate.

All in violation of Title 26 U.S.C., Section 4705(a).

COUNT VI

That on or about April 11, 1966, at Seattle, Washington, within the Northern Division of the Western District of Washington, JACKSON MORGAN did knowingly and unlawfully sell a quantity of narcotic drugs, to wit, 30.009 grams of heroin hydrochloride, not in pursuance of a written order of the person to whom

such heroin hydrochloride was sold on a form issued in blank for that purpose by the Secretary of the Treasury or his delegate.

All in violation of Title 26 U.S.C., Section 4704(a).

APPENDIX B

Judgment Sentence and Commitment by United States District Court

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JACKSON MORGAN,
Defendant.
No. 51157

On this 27th day of January, 1967, came the Attorney for the Government and the defendant appeared in person and by counsel, Julian Herndon, Jr.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a finding of guilty by the Jury on Counts I, II, III, IV, V and VI of the offense of violation of Title 21, U.S.C., Section 174 as charged in Counts I and II, a violation of 26 U.S.C., Section 4704(a) as charged in Counts III and IV, and a violation of 26 U.S.C., Section 4705(a) as charged in Counts V and VI, and

The Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged in Counts I, II, III, IV, V and VI and to said Counts is convicted.

On Count I, IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of imprisonment of TEN (10) years.

On Count II, IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of imprisonment of TEN (10) years.

On Count III, IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of imprisonment of TEN (10) years.

On Count IV, IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of imprisonment of TEN (10) years.

On Count V, IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of imprisonment of TEN (10) years.

On Count VI, IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a term of imprisonment of TEN (10) years.

IT IS FURTHER ADJUDGED that said sentence on Counts II, III, IV, V and VI will run concurrently with the sentence on Count I.

IT IS ORDERED that the Clerk deliver a certified copy of this Judgment and Commitment to the United States Marshal or other qualified officer, and that the copy serve as a commitment of the defendant.

APPENDIX C

Opinion Below of United States Court of Appeals for the Ninth Circuit

JACKSON MORGAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 21,811

(March 13, 1968)

Appeal from the United States District Court for the Western District of Washington.

Before: POPE, MERRILL and CARTER, Circuit Judges.

Per Curiam.

The defendant in this case, appellant here, was charged with offenses under six counts of an indictment. Two counts charged sale or concealment of narcotics under 21 USC § 174; two counts charged sale of narcotics without federal tax stamp under 26 USC § 4704(a) and two counts charged sales of narcotics without the required order form, 26 USC § 4705(a). Defendant was convicted on all six counts by jury verdict and he was sentenced to ten years on each count to be served concurrently.

At the trial the evidence was overwhelming that defendant sold narcotics at various times to one Gordon, a deputy sheriff of King County, Washington, who was acting at the time on behalf of the Federal Bureau of Narcotics as an undercover agent. Appellant specifies error in the action of the trial court in refusing to permit the defendant to cross-examine the purchaser of nar-

cotics and another federal agent who observed the purchase about a man named Harvey Edwards.

The trial court very properly refused to permit this examination on the ground that there was no showing that the questions sought to be propounded were in any manner relevant to this case. There is no showing whatever that the court's ruling in this respect was in any manner prejudicial to the defendant.

Appellant also attacks certain provisions of the above named Sections 174 and 4704(a) as unconstitutional in that they provide for what is referred to as certain presumptions. Thus § 174 contains a provision as follows: "Whenever on trial for a violation of this Section, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." And §4704(a) contains a provision as follows: "... the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

At the trial at which no evidence was offered by the defendant, the defense developed by cross-examination of the chemist who testified for the Government, that the narcotics here in question could have been produced from poppies grown in various parts of the United States. The argument is that Congress could not validly establish any such presumption or make the proof mentioned prima facie evidence any more than is could by statute "make a dog a cat or change something from what it normally or naturally is"; and that the presumption is not based on any facts that would authorize it.

Aside from the fact that the growing of opium poppies in the United States is prohibited by law, 21 USC 188(b), it is well established by the decisions that the provisions here under attack are valid and constitutional. See Yee Hem v. U.S., 268 U.S. 179; Agobian v. U.S., 323 F.2d 693, 9 cir.; Orozco-Vasquez v. U.S., 344 F.2d 827, 9 cir., Brown v. U.S., 370 F.2d 874, 9 cir., United States v. Secondino, 2nd cir., 347 F.2d 725; United States v. Gainey, 380 U.S. 63.

Appellant also assigns as error the court's rejection of a portion of one of his offered instructions. We find no merit in this contention in view of the fact that the instructions as a whole adequately cover the point sought to be made by the appellant.

Since we find no error in the record, the judgment is affirmed.

APPENDIX D

Judment Below

JACKSON MORGAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 21,811

APPEAL from the United States District Court for the Western District of Washington.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered March 13, 1968.

APPENDIX E

Order Denying Rehearing

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Wednesday, April 17, 1968.

Before: POPE, MERRILL and CARTER, Circuit Judges.

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of appellant filed April 12, 1968, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

REME COURT, U. S.

No. 198

Office-Supreme Court, U.S.
FILED
JUL 16 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

JACKSON MORGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 108

JACKSON MORGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 391 F. 2d 237.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 1968. A petition for rehearing was denied on April 17, 1968. The petition for a writ of certiorari was filed on May 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the statutory presumption arising out of unexplained possession of narcotics, set forth in 21 U.S.C. 174, violates the due process requirements of the Fifth Amendment.

2. Whether the statutory presumption in 26 U.S.C. 4704(a), covering possession of narcotics in a package not containing the requisite revenue stamps, comports with the due process requirements of the Fifth Amendment.

3. Whether the tax stamp and order form provisions of 26 U.S.C. 4704(a) and 26 U.S.C. 4705(a) impinge upon petitioner's privilege against self-incrimination.

STATEMENT

Petitioner was tried by a jury in the United States District Court for the Western District of Washington and was convicted on two counts each of unlawfully dispensing illegally imported heroin (21 U.S.C. 174), of selling heroin other than in or from the original stamped package (26 U.S.C. 4704(a)), and of dispensing heroin without having obtained a written order form from the transferee (26 U.S.C. 4705(a)). On January 27, 1967, petitioner received concurrent ten year sentences on each of the six counts. The court of appeals affirmed. 391 F. 2d 237.

Petitioner's guilt was established primarily through the testimony of an undercover narcotics agent, Joseph Gordon, who testified that on March 21, 1966, petitioner telephoned him to arrange for a sale of narcotics. Thereafter, the agent obtained $700 in government funds and met with petitioner who trans-

ferred 61.692 grams of heroin to the agent (2 R. 110, 112)[1] in exchange for the $700 (2 R. 43-51). The agent did not present any written order form to petitioner nor did the package of heroin which the agent received bear any revenue stamps (2 R. 52-53). On April 11, 1966, the agent gave petitioner $350 in exchange for 30 grams of heroin (2 R. 60-64, 114). Again, no order form was exhibited and no revenue stamps were affixed to the container of narcotics (2 R. 65, 67). Petitioner offered no testimony in his own behalf. On cross-examination, however, a government chemist testified that heroin could be manufactured from poppies grown within the borders of the United States and that it was impossible to determine whether a particular sample of heroin was of domestic or foreign origin (2 R. 117-119).

ARGUMENT

1. Petitioner attacks the rationality of the inference provided in 21 U.S.C. 174, permitting the jury to infer illegal importation and knowledge thereof from the unexplained possession of heroin. The mere fact that it is theoretically possible to grow opium poppies in the United States, and to make heroin from them, does not, however, render the inference irrational. We recognize, of course, that in *Leary* v. *United States*, No. 65, this Term, this Court has granted the petition for a writ of certiorari to review the validity of an analogous inference with re-

[1] "2 R." refers to the transcript of the trial proceedings, a copy of which is lodged with the Clerk of this Court.

spect to the importation of marihuana. Unlike that inference, however, the validity of the inference covering opium and its derivatives has been specifically upheld by this Court, *Yee Hem* v. *United States*, 268 U.S. 178, and this Court declined further review of a similar challenge even after the grant in *Leary. United States* v. *Miller*, 381 F. 2d 529 (C.A. 2), certiorari denied, No. 857, O.T. 1967 (June 17, 1968). There is no occasion to grant review here.

Unlike marihuana, which reportedly has grown in a wild state in the United States, the "[opium] poppy is one of the most delicate plants cultivated by man." *The Cultivation of the Opium Poppy in Turkey*, Bulletin on Narcotics, v.2 #1:p. 15 (1950). After approximately six months of growth—assuming the grower has properly weeded and thinned his acreage, and has protected the crop from frost, wind, storms, extreme moisture, extreme cold, and extreme warmth —the bulb of the opium poppy must be incised to collect the opium latex. Since incision and collection requires expert skill and must be done manually, the collection of latex from one hectare (2.471 acres) of land requires approximately 1280 working hours for a yield of about 7 kilograms of opium. United Nations Permanent Narcotics Board, *Report to the Economic and Social Council on the Work of the Board in 1966*, E/OB/22, p. xviii (1966). In a two-step process, raw opium is reduced to heroin. Morphine is first extracted from the raw opium. Ordinarily, 10 kilograms of opium will yield 1 kilogram of morphine. There is no equivalent reduction during the processing of morphine to heroin.

For the five year period 1962-1966, some 223,672 kilograms (734,078 pounds) of raw opium have been seized in international illicit traffic. United Nations Commission on Narcotic Drugs, *Review of the Illicit Traffic in Narcotic Drugs During 1966/1967*, E/CN. 7506, Annex II (1967). During that same period of time, however, only 16.14 kilograms (32 pounds) have been seized within the boundaries of the United States.[2] There has been no reported growth of the opium poppy in the United States for the past two decades,[3] nor have there been any seizures of heroin conversion laboratories within that time period. In these circumstances, permitting an inference that unless otherwise explained any particular sample of heroin seized in the United States had its origin in foreign opium can scarcely be said to lack the necessary rational connection "'between the facts proved and the ultimate fact presumed'." *United States* v. *Gainey*, 380 U.S. 63, 66.[4]

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[2] This figure includes 20 pounds of smoking opium seized in New York City in the possession of Chinese nationals, which, according to available evidence, originated in Singapore, not in this country.

[3] Growth of the opium poppy in the United States was made unlawful, with certain exceptions, by the Opium Poppy Control Act of 1942 (21 U.S.C. 188-188n).

[4] Petitioner's argument that Congress never intended the presumption to be operative when the origin of the narcotics was questioned is clearly rebutted by the precise and all-inclusive language of the statute—"*Whenever* * * * the defendant is shown to * * * have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction * * *." (Emphasis added.) Once the gov-

2. Petitioner also attacks, on due process grounds, the presumption contained in 26 U.S.C. 4704(a) that the tax imposed on narcotics (see 26 U.S.C. 4701(b)) has not been paid if the narcotics do not bear the appropriate Treasury stamps. Petitioner's argument rests, however, upon a misconception as to both the elements of the offense and the effect of the presumption contained in Section 4704(a). This section is designed to limit the commerce in narcotics to drugs upon which an importer, producer, manufacturer or compounder has paid the tax imposed by 26 U.S.C. 4701. Since the stamp is evidence of the payment of the tax, see 26 U.S.C. 4771, it is entirely reasonable to create a presumption that if the package bears no stamp the tax has not been paid. Since this presumption is based on a reasonable relationship between the fact established and the ultimate fact presumed, it satisfies the standard of due process. See *Vick* v. *United States*, 304 F. 2d 379, 380 (C.A.D.C.); cf. *Harris* v. *United States*, 359 U.S. 19, 20-21, 23; *Roviaro* v. *United States*, 353 U.S. 53, 63. Petitioner's contention that Congress did not intend that this presumption transfer the burden of proof to the defense is irrelevant. What Congress did clearly intend was to shift the burden of going forward with evidence once the government has established posses-

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ernment has established possession, a *prima facie* case is established. If the defendant wishes to cast doubt either on his knowledge of importation, or on his possession of the narcotics, or as here, on the foreign origin of the narcotics, he must go forward with some evidence that "explains the possession to the satisfaction of the jury."

sion of narcotics in an unstamped package. It was then incumbent upon the accused to satisfy the jury that the possession was rightful and that the tax had been paid. See *Roviaro* v. *United States*, 353 U.S. 53, 63.

3. Petitioner attacks the constitutionality of 26 U.S.C. 4704(a) and 4705(a) on the ground that compliance with these statutes would compel him to disclose information of an incriminatory nature. As petitioner's convictions on the two counts based on 21 U.S.C. 174 are supported by the evidence and not otherwise subject to substantial challenge, it is unnecessary to reach the constitutionality of petitioner's convictions under the questioned statutes on which he received concurrent sentences. See *United States* v. *Gainey*, *supra*, 380 U.S. at 65; *Lawn* v. *United States*, 355 U.S. 339, 362; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.

In any event, nothing in the questioned statutes would have compelled petitioner to incriminate himself. Those sections are part of a comprehensive tax scheme (26 U.S.C. 4701-4736, 4771-4774) designed to limit dealings in dangerous narcotic drugs to legitimate purposes. Under the provisions of the statutes, and the implementing regulations, any person who wishes to deal (*i.e.*, import, manufacture, produce, compound, sell, deal in, dispense, or give away) in narcotic drugs must register and pay an occupational tax at a rate prescribed by law (26 U.S.C. 4721-4722; 26 C.F.R. 151.21, 151.41).[5] Persons may not register

[5] The registration must be renewed, and the tax paid, annually (26 C.F.R. 151.22).

under the provisions of the Act, or pay the tax, unless they can satisfy the Bureau of Narcotics, after an investigation, that they are qualified under state law to conduct the business or activity for which registration is sought (26 C.F.R. 151.23-151.24). Once so registered, importers, manufacturers, producers, and compounders are subjected to a commodity tax at the rate of 1 cent per ounce on narcotic drugs which have been imported or produced, and which have been sold, or have been removed for consumption or sale (26 U.S.C. 4701; 26 C.F.R. 151.121, 151.125-151.126). The commodity tax is paid in the following manner: When the narcotic drug is imported, or produced and set aside for consumption or sale, the importer or producer must purchase from the district director of Internal Revenue adhesive tax stamps representing payments of the appropriate tax; these stamps are, in turn, affixed by the importer or producer to each package or container (according to the respective weight) prior to sale (26 U.S.C. 4771; 26 C.F.R. 151.128-151.130). To ensure that these drugs will not reach the illicit market, no person is allowed to deal in narcotic drugs which are not in a stamped package or container (26 U.S.C. 4704(a), one of the statutes violated by petitioner). Moreover, the Act makes explicit the conditions under which the narcotic drugs may be sold. With the exception of drugs dispensed directly by physicians or under written prescriptions (26 U.S.C. 4705(c)), all transfers of narcotics must be made pursuant to an order form given to the transferor by the transferee (26 U.S.C. 4705(a); 26 C.F.R. 151.141). In order for a prospective pur-

chaser to acquire the order form which he must give to his intended seller, he must make an application to the district director, showing *inter alia* that he is properly registered under the provisions of 26 U.S.C. 4722 (26 U.S.C. 4705(f); 26 C.F.R. 151.142-151.143). It is unlawful to obtain order forms for any purpose other than in connection with the "conduct of a lawful business" or with "the legitimate practice of his profession" (26 U.S.C. 4705(g)). A sale of narcotic drugs not in pursuance of an order form is punishable under the provisions of 26 U.S.C. 4705(a).

It is clear, therefore, that under this statutory plan petitioner was not compelled to register and thereby incriminate himself. The only persons compelled, and indeed, allowed, to register are those who are qualified to deal in narcotics under state law—a class to which, it is not disputed, petitioner does not belong.

In *Leary* v. *United States*, *supra*, this Court has granted review of the question whether the order form and tax provisions of the Marihuana Tax Act (26 U.S.C. 4741-4744) violate the privilege against self-incrimination as applied in *Marchetti* v. *United States*, 390 U.S. 39; *Grosso* v. *United States*, 390 U.S. 62; and *Haynes* v. *United States*, 390 U.S. 85. In *Leary*, however, an element of the crime for which that petitioner was convicted—transportation of non-tax paid marihuana (26 U.S.C. 4744(a)(2))—was his failure, as a purchaser, to have applied for and obtained an order form—actions which Leary claims would have been incriminating. Here petitioner was not convicted for his failure to register, but for his

conduct of selling heroin not in a stamped package and not pursuant to an order form obtained by a properly registered transferee (26 U.S.C. 4705(a)). These statutes, like typical criminal statutes, do not punish a failure to make incriminatory disclosures, but rather proscribe certain kinds of conduct which would have involved no disclosures on his part and which petitioner chose to pursue in plain violation of the law. His convictions in no way impinge upon his privilege against self-incrimination.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 O 312656 12